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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

Suit No.608 of 1986

Bank of Baroda ..Plaintiff

V/s

1. Mr.Dilip Kumar Radhakishan Dalmia
2. Mrs.Kuisumdevi Dalmia
3. Mr.Shanarlal Agrawal ..Defendants

Mr.V.V.Shinde i/b Tandel and Co. for plaintiffs

Mr.Girish Desai i/b K.S.Jain for defendant no.3

CORAM:S.R.SATHE,J.

DATED:23rd Dec. 2005

ORAL JUDGMENT :-

1. The plaintiff nationalised bank has filed the suit against the defendants for recovery of amount of Rs.4,53,371-19 ps. and future interest on the said amount at the rate of 20% p.a. from the date of the suit till realisation of the amount.

2. Plaintiff case in brief is that the defendant no.1 is the sole proprietor of the business named and style as M/s Radhakishan Dalmia and Sons. At the rate of the

defendant no.1 plaintiff granted to the defendant no.1 by way of bill purchase facility with a limit of Rs.3 lacs whereby the plaintiff agreed to discount/purchase bills of exchange/hundis drawn by the defendant no.1 in favour of itself or the plaintiff as its bankers. As per terms of the said facility in the event of any such bills/hundis remained unpaid by the drawee's thereof, the amounts advanced to the defendant no.1 towards the discount/purchase of bills/hundis were repayable by the defendant no.1 with interest and other customary charges. Accordingly, the defendant no.1 executed the necessary documents including the letter of undertaking dated 15-12-1982. In pursuance of the said facility the plaintiff purchased/discount on 19-1-1983 and 2-2-1983 two bill/hundis no.13 in the sum of Rs.1,51,195-61 drawn by the defendant in favour of the plaintiff on Jairamdas Bhogchand, being the purchasers of goods from defendant no.1. Similarly, the plaintiff purchased on 1-12-1983 16 hundis for sum of Rs.1,52,257-98. When the said bills were presented to the drawees for payment, they did not honour the said bills. Under the terms of the said bill purchase facility, the plaintiff was entitled to take possession of the goods and sell them to recover the amount advanced to the defendant no.1. However, when the transport operator was contacted by the plaintiff it transpired that the transport receipts were were stolen or forged and issued without their knowledge. By the letter of guarantee dated 15-12-1982 the defendant no.2 guaranteed to the plaintiff the due repayment of the

amount due to the plaintiff from the defendant no.1 in respect of the said bill purchase facility. Similarly, by a letter of guarantee dated 26-10-1983 defendant no.3 guarantied to the plaintiff repayment of all the amounts due to the plaintiffs from the defendant no.1 in respect of the said bill purchase facility.

3. Finding that the defendant no.1 had not repaid the amount due under the said facility in respect of the bills of exchange/hundis dishonoured, plaintiff issued notice dated 29-4-1985 to the defendant no.1. The defendant no.1 replied the said notice and contended that the plaintiff's demand was premature. Then again plaintiff issued notice through Advocate to the defendant nos.1 to 3 and called upon them to clear the dues. In spite of receipt of notice the defendant nos.2 and 3 neither paid nor replied the notice. Hence plaintiff filed the present suit for recovery of amount of Rs.3,03,453-59 ps. as well as interest accrued thereon. Thus in all Rs.4,53,371-19.

4. Defendant nos.1 and 2 did not file written statement while defendant no.3 filed written statement and opposed the suit claim. On 30-1-2003 the Court (Coram:F.I.Rebello,J.) decreed the plaintiff's suit against the defendant nos.1 and 2 in terms of prayer clause (a). However, reduced the rate of interest from 20% p.a. to 12% p.a. and directed that suit be proceeded against defendant no.3.

5. The defendant no.3 contended that he is not at all concern with the dealings of the plaintiff with defendant no.1 prior to the execution of the purported letter of guarantee dated 26-10-1983. According to him the so called guarantee was taken for the purpose of future advance and not for the past dues. After execution of the alleged guarantee the plaintiff did not advance any amount to the defendant no.1. The suit filed by the plaintiff is pertaining to past advance only. Hence the defendant on.3 contended that he is discharged from so called guarantee. Defendant no.3 also contended that his signatures were taken by the plaintiff on the printed form of letter of guarantee on the representations that the plaintiffs would advance further amount to the firm of the defendant no.1 to the tune of Rs.3 lacs for doing business. However, as the plaintiff did not advance any amount thereafter he is not liable to pay the amount claimed by the plaintiff. The defendant no.3 also contended that the plaintiff is not entitled to get interest as claimed. Hence on all these grounds the defendant no.3 prayed for dismissal of the suit.

6. On these pleadings this court (Coram:F.I.Rebello,J.) has framed the followings issues. I have given my findings as mentioned against the same.

1. Whether defendant no.3 proves that
the suit against him is misconceived and

not maintainable? No.

2. Whether defendant no.3 proves that the guarantee dated 26th October 1983 Exh.D to the plaint was taken for future advances only and that no consideration was passed for coming into operation of the said guarantee? No

3. Whether defendant no.3 proves that he is discharged from his liability under the guarantee dated 26th October 1983 Exh.D to the plaint? No

4. Whether the plaintiff proves that the defendants are liable to pay the decreetal amount? Yes.

7. In order to prove the suit claim plaintiff bank has filed affidavit of evidence of its employees Ramsing Shetia, Assistant General Manager of the plaintiff bank working at Nariman Point Branch as well one Sham Tukaram Jadhav, Senior Manger of the Bank of Baroda, Nariman Point Branch and also produced the original documents executed by the defendant no.1 to 3. As mentioned above suit is already decreed against defendant nos.1 and 2. Besides this, both the plaintiff's witnesses have clearly stated about the execution of the document and its

correctness. Plaintiff's evidence in that behalf is also not challenged seriously and there is no reason to disbelieve the same. So, it is clear that the plaintiff has proved that when the suit was filed principal amount of Rs.3,03,453-09 was due towards principal and interest thereon and thus in all Rs.4,53,371-19 has been due from the defendants.

8. The main and material question is whether the defendant no.3 as a guarantor, is liable to pay the said amount to the plaintiff bank. At the outset it may be mentioned that execution of the guarantee deed dated 26-10-1983 Exh.P-2 is not disputed. Even the defendant no.3 has clearly admitted that the said guarantee is signed by him on 26-10-1983. His only contention si that at the time of signing the said guarantee deed the officers of the plaintiff bank had told him that guarantee that was being executed by the defendant no.3 is in respect of future advance that would be made to the defendants and it has nothing to do with the past dues or advances. However, firstly, it must be noted that besides the bear interested words of the defendant no.3 there is absolutely nothing on record to show that such representation was made by the plaintiffs bank to the defendant no.3. If really such representation would have been made then certainly the defendant no.3 would not have failed to obtain the specific writing to that effect from the plaintiff. But that has not happened. We cannot ignore the fact that defendant no.3 is not an

illiterate person but on the contrary he has studied upto B.Sc.(Agri) and he is a chairman of Altra Movie Channel Ltd. and other Altra Group companies, doing business of manufacturing VIDEO castes and CDS and DVDs. From his deposition also it is very clear that he is not the person who is not aware of the business transactions and the execution of the documents. He appeared to be shrewd businessman. Initially he tried to crate impression that he had not even visited the plaintiff's bank at any time or that any dealing with the plaintiff bank. However, when he was confronted with his document he had to admit that he is a partner in the firm Jairamdas Bhagchand and the said firm is having account in the plaintiff bank. When such is the position, it is not possible to accept the bare testimony of the defendant no.3 when he says that at the time of execution of guarantee deed officers of the plaintiff bank had told him that guarantee is being obtained for future advance that will be given to the defendant no.1.

9. It is admitted fact that defendant no.1 was well known to the defendant no.3 and they had business transaction amongst them for a long period. The very fact that the defendant no.3 stood as a guarantor to the defendant no.1 for such a huge amount clearly goes to show that he had good relations with the defendant no.1 and he wanted to help defendant no.1. So, under such circumstances he executed the agreement of guarantee. Incidently, it must be noted that if really the defendant

no.3 would have executed the guarantee deed because of the representation made by the plaintiff bank as alleged by the defendant no.3 then certainly atleast at the time when plaintiff bank issued notice to the defendant no.3 and called upon him to pay the dues the defendant no.3 would have given reply and stated under what circumstances he executed the guarantee deed. But that has also not happened.So of non giving of reply to the plaintiff’s notice also speaks volume.

10. Leaving aside the oral evidence and other circumstances of the case we have to see what the documents in question indicate whether there is anything in the said agreement or deed which suggest that defendant no.3 stood as a guarantor only for future transactions which were to take place after the execution of the guarantee or whether it appears that the defendant no.3 has clearly admitted his liability to pay the dues of the defendant no.1, that is amount which was then due as well as the amount that would become due thereafter.

11. In the guarantee deed Exh.P2 it is clearly mentioned "in consideration of bank of Baroda giving credit or accommodation or granting facilities to M/s Radhakishan Dalmia and Sons by making/opening/continuing a Loan/Overdraft/Cash Credit account or by discounting purchasing and/or negotiating bills with or without security and/or in consideration of the Bank opening and giving letters of Credit and/or trust receipt facilities

in favour of M/s Radhakishan Dalmia and Son on terms and conditions that may be settled between you and the said M/s Radhakishan Dalmia and Sons at any time and also all of bills promissory notes or guarantees held by the bank"

12. So, from this particular language in the guarantee deed it is very clear that defendant no.3 stood as a guarantor to the defendant for due payments of all the amounts due to the plaintiff from the defendant no.1 in respect of the purchase facility and he was even a guarantor for continuing the loan facility to M/s Radhakishan Dalmia and Sons. So, it is very clear that defendant no.3 stood as guarantor for all these amounts due from the defendant no.1 to the plaintiff.

13. A feeble attempt has been made on the part of the defendant no.3 to show that when guarantee deed was executed the plaintiff bank was aware that the transport receipts given by the defendant no.1 were not accepted by the transporter and the defendant no.1 had played a fraud on the plaintiff bank. However, the plaintiff bank did not inform the defendant no.3 about the said fraud and as such the guarantee deed dated 26-10-1983 is not legal. However, it must be noted that as a result of dishonouring of the bills and transports not accepting the genuineness of transport receipts had fallen due from the defendant no.1 to the plaintiff bank So, it was in fact necessary for the plaintiff bank to have some security for defendant’s transaction and it was defendant

no.1 who had brought defendant no.3 as a guarantor. So, under such circumstances whether plaintiff had informed the defendant no.3 about the transporter's rejecting the transport receipts given by the defendant no.1 or not is not material. In any event when defendant no.1 offered defendant no.3 as a guarantor and defendant no.3 accordingly executed the deed of guarantee Exh.P-2 the defendant no.3 is bound to make the payment as per the said agreement. Hence it is very clear that there is no substance in the contention taken out by the defendant no.3 and plaintiff has proved the suit claim even against defendant no.3. So, plaintiff has proved the suit claim and that the defendant nos.1 to 3 are jointly and severally liable to pay Rs.4,53,371-10 ps.

. In this view of the matter, the defendant no.3 to pay plaintiff bank (jointly and severally with defendant nos 1 and 2) sum of Rs.4,53,371-19 ps. and future interest on principal amount of Rs.3,03,453-59 at the rate of 12% p.a. from the date of suit till realisation of the amount. The defendant no.3 to pay the cost of this suit and bear his own.

(S.R.SATHE,J.)